S T A T E O F M I C H I G A N

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R. A. Griffin, J. T. Neff, H. N. White

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	Supreme Court No. 119818
-vs-	Court of Appeals No. 221264
JONATHAN JOE JONES, Defendant-Appellee.	Lower Court No. 98-016374-FC-3

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

MICHAEL D. THOMAS (P23539)
PROSECUTING ATTORNEY - SAGINAW COUNTY

Submitted by:

JANET M. BOES (P37714)
ASSISTANT PROSECUTING ATTORNEY
Saginaw County Prosecutor's Office
Courthouse
Saginaw, MI 48602
(989) 790-5330

LESTER O. POLLAK (P23120)
ATTORNEY FOR DEFENDANT-APPELLEE
306 First Street
Jackson, MI 49201
(517) 787-1830

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Michigan Cases

Cont. of Michigan Cases **Page**

Federal Cases

Other State Cases

Cont. of Other State Cases **Page**

Statutes & Court Rules

Miscellaneous reference materials

JURISDICTIONAL STATEMENT

In July of 1999, following a jury trial in the Saginaw County Circuit Court, Defendant Jonathan Joe Jones was convicted of:

I - First-degree premeditated murder; and

II - Conspiracy to commit First-degree premeditated murder. (4a-5a) After sentencing, Defendant appealed as of right to the Court of Appeals. (9a)

On July 17, 2001, the Court of Appeals reversed and remanded this case for a new trial on the basis of one issue. (13a-15a)

The People sought leave to appeal in this Court and on April 12, 2002, the Court granted the People's application for leave to appeal. (16a)

MCR 7.301(A) provides the basis for jurisdiction over this appeal by leave granted.

STATEMENT OF QUESTION PRESENTED

By bringing up inadmissible polygraph evidence, did the defense waive any claim of error to evidence offered in response, or alternatively, was the prosecutor's introduction of polygraph evidence a justified response to right the scale upset by Defendant's improper question and the defense actions in relation to this issue - precluding reversal absent extraordinary circumstances?

The Court of Appeals said "NO".

The Trial Court did not answer.

Defendant-Appellee says "NO".

Plaintiff-Appellant says "YES".

STATEMENT OF FACTS

Introduction

In August of 1998, Oliver Rodel Henderson was found bruised and bloodied about the head, lying next to a vacant house in the City of Saginaw. Henderson later died from his injuries - blunt force head trauma with complications. (17a-39a, 207a)

Defendant Jonathan Joe Jones and co-conspirator Kim Gerald Martin were charged with the murder of Henderson and were convicted in separate jury trials of:

I - 1st-degree premeditated murder; and

II - Conspiracy to commit 1st-degree premeditated murder. (1a)

Witnesses for the People during Defendant's six-day trial included:

- Ricky Jones - an eyewitness to the crime (63a-103a);
- Julie Pryor - who lived in Defendant's home and heard Defendant admit to having "kicked" and "stomped" the victim (154a-189a);
- David Stephens - an expert in serology and blood splatter interpretation who examined and explained blood found on a pair of pants identified as Defendant's (117a-140a);
- Niebita Manhanti - a DNA analyst and expert, who found and identified a DNA match to the the victim's blood on a lower pant leg of a pair of Defendant's pants and on a pair of co-conspirator Martin's shoes (243a-255a);
- medical personnel - who treated the victim (27a-40a, 190a-197a)
- police investigators - who examined the scene, interviewed witnesses and collected evidence (17a-26a, 41a-55a, 58a-62a);
- Kanu Virani - the forensic pathologist who performed the autopsy (198a-207a).

Defendant also presented several witnessess and testified at trial himself, claiming he was not involved in the assault and murder. (208a-225a, 256a-275a, 266a-276a)

Defendant appealed his conviction and sentence. Following the Court of Appeals reversal of the case, the People's application for leave to appeal in this Court was granted. (13a-16a)

Trial Proceedings and Evidence

In 1998, Defendant lived in the City of Saginaw with several friends and members of his extended family. (154a-157a, 220a-221a) Oliver Rodel Henderson, often referred to simply as "Rodel", was friendly with Defendant. In the summer of 1998, Rodel was known to stop by Defendant's residence from time to time. Rodel spent one August night at Defendant Jones' residence watching TV with several other members of the household. The next morning Defendant's TV was missing. Defendant was very upset but apparently found out where the TV was located and paid $60.00 to get it back. (158a-161a, 222a-224a)

On August 8, 1998, a break in occurred at a home shared by Emily Drain and Kim Martin. A VCR, a play station and money were taken, as well as a pillowcase and a bicycle. The bicycle belonged to Kim Martin. (104a-109a)

On the same date as the Martin break-in, August 8, 1998, Reginald Johnson was standing on a street corner in the City of Saginaw. Johnson saw Rodel, the murder victim, who he knew had a crack habit, riding by on Martin's bicycle. Rodel was carrying a

pillowcase. Rodel spoke with Johnson and told him that he had a VCR in the pillowcase and that he was going to sell it. (141a-147a, 153a) A short time later, Johnson informed an angry Kim Martin that he had seen Rodel on Martin's bike. (149a-152a)

Kim Martin was "mad" about the break-in. (110a) Martin told Emily Drain that Rodel was the person who broke into the house. (114a-116a)

Kim Martin was Defendant's co-conspirator, but he was neither a witness nor a co-defendant at Defendant's trial. However, Julie Pryor testified that Martin visited Defendant's residence on at least one or two occasions. She heard Defendant discussing the missing TV with Martin. On another occasion, Julie Pryor heard Defendant talking to a friend named Keith. Defendant stated that he knew who had taken the TV and he was going take care of it, get him - kick his ass. (162a- 163a, 172a-173a)

On August 11, 1998, Ricky Jones, who had known Kim Martin his entire life, was walking home between 2 and 3 a.m. As he walked up Seventh Street, Ricky Jones saw Kim Martin fighting with another man. (64a-67a, 90a) Ricky Jones heard Martin repeatedly ask: "Why did you break in my house?" (67a-71a) The other man struggled to get away from Martin and pulled out of his shirt to do so. The other man then ran from Martin and Martin called out to Ricky Jones to stop him. The shirt was left lying on the ground. (68a-70a, 77a-78a, 92a) Before Ricky Jones could respond, the man running away fell in the street and Martin began kicking him in the head. (70a-

71a) The man being kicked managed to move from the street to the grass but Martin continued kicking him in the head. (71a-73a) As Martin kicked the man on the grass, Ricky Jones felt it had gone on long enough. He approached the two and tried to stop Martin by pushing him away from the victim. However, Martin was bigger than Ricky and continued the assault. (73a-74a, 89a-90a, 95a, 98a, 101a)

Martin eventually stopped the assault and went to a nearby house. When Defendant came to the door, Martin asked Defendant if he wanted some of it. (79a) Defendant responded by coming out and jumping on the victim's head with both feet, four to five times. (80a-81a) The victim was then left lying next to the house where the final assaults took place. (75a, 82a-83a)

Although Ricky Jones had been drinking (4 or 5 beers over a 12 to 14 hour period) and had used some crack-cocaine earlier that date (around midnight), he was not intoxicated or under the effect of cocaine when he observed the assault by Martin and Defendant sometime between 2 and 3 a.m. (96a)

After witnessing the assaults, Ricky Jones went on to his own home down the street where he found that his mother had locked him out. He then returned to the residence he had been visiting earlier. From there, Ricky Jones called 9-1-1 and reported the location of the victim. (35a-86a, 93a, 263a-264a) The woman he was visiting made him leave before the police arrived in response to his call. (263a-264a)

An officer and a paramedic arrived at the crime scene on

Seventh Street shortly after 4 a.m. They found the victim lying on the ground next to a house - breathing but unresponsive. (17a-19a, 30a) The victim's face was cut, bruised and swollen, teeth were missing and blunt head trauma was obvious. (27a-32a) There was no shirt on or near the victim's body when the first officer arrived at the scene. (21a-25a) The victim was determined to be Oliver Rodel Henderson. (19a, 232a-233a)

Other officers securing the scene and collecting evidence found a shirt and jacket near the sidewalk and street. Photographs of the shirt and jacket as found were admitted into evidence. (45a-47a, Exhibits 7 & 8) The seizing officer specifically recalled that the jacket appeared to be inside out when found on the street. (236a-237a)

The neurosurgeon who treated the victim at the hospital found him in a coma with one tooth hanging out and a large blood clot to his brain. (191a-194a) He determined that the injuries were caused by blunt force trauma - consistent with being kicked in the head. (195a-196a) Mr. Henderson never recovered from the injuries.

A forensic pathologist performed an autopsy on Oliver Rodel Henderson. He noted the victim's height was 5' 11". The pathologist determined that manner of death was homicide - caused by blunt force head trauma and complications. (198a-297a)

Julie Pryor lived at Defendant's residence with her two sons. Defendant was the grandfather of one of her sons. (154a-156a) She had seen the victim, Rodel, at the residence she shared with

Defendant on several occasions. She had never known Rodel to borrow clothes from anyone else. (157a-159a, 178a) On the date that Oliver Rodel Henderson was beaten and left lying unconscious, Ms. Pryor arrived home about 5 a.m. Defendant came in a few minutes later and nervously asked her if the police had been there. Then Defendant went upstairs, changed his clothes and left. (168a-169a, 174a) She found this behavior unusual and later spoke with Defendant about what had happened to Rodel. Defendant admitted that he did it - he laughed it off and remarked: "I kicked his ass." (170a-172a, 178a)

Pryor also heard Defendant tell his friend, Keith, about Rodel. Defendant told Keith that he had "stomped his ass." (176a) She observed Defendant laughing and heard Defendant say: "he ain't going to steal my TV no more, I bet you he ain't going to do nothing." (177a)

Police officials searched Defendant and co-conspirator Kim Martin's residences several days after the homicide. (47a, 58a-63a) Officers seized clothing from Defendant's residence, including a pair of green pants belonging to Defendant that had blood stains on them. (47a-50a, 67a, 180a-181a, 271a) From co-conspirator Martin's residence, they seized a pair of Martin's tennis shoes that had a sole pattern consistent with a shoe print from the area of the crime scene. The same shoes were found to have blood stains on them. (60a-61a, 231a, 238a)

Forensic scientist David Stephens, an expert in serology and bloodstain patterns analysis or blood spattering, examined the

bloodstained items. (117a, 122a-141a) On Defendant's pants, Stevens found soaking bloodstains which appeared to have been wiped or cleaned on the left pant leg, about 6-inches above the bottom seam. (129a, 132a) He characterized the pant stain or stains as a "contact stain" and described the stain as "seeping" - a result of being in contact with a bloody object. (132a, 137a-141a) On Co-Defendant's shoes he found three separate blood stains which had been wiped. (124a-126a) Witness Ricky Jones' shirt which had also been submitted for analysis was found to have a very small blood stain - the size of a pin-head - on the front of the shirt. (134a-135a) This stain was characterized as consistent with splattering - "fly off" from a body when an individual is struck or kicked. (136a-137a)

Samples from the pant and shoe stains were submitted to the State Police Forensic Unit - DNA specialist for analysis. (126a-127a, 133a-134a) DNA methodology profiling expert, Niebita Manhanti, Ph.D., examined the pant, shoe, and shirt samples submitted for analysis in relation to this case. (244a-246a, 251a-254a) She found a blood pattern match to victim Henderson for each of the samples submitted - from Defendant's pants, Martin's shoes, and eyewitness Jones' shirt. The match probability, based upon statistical analysis, was one in 57.4 million. (253a-255a)

Defendant who is 5' 9 1/12" tall and weighed about 168 pounds claimed that the victim Oliver Rodel Henderson was 5' 8" tall. Defendant testified that Henderson spent time at his house -

watching TV, eating meals, using the shower and changing his clothes - over a period of several weeks before he was found battered and bloody in the area of Defendant's home. (266a-267a, 270a, 272a-274a) Defendant also claimed that the victim would occasionally wear Defendant's clothes. (268a) Defendant stated that he was not in any way involved with the assault on the victim. (267a-268a) He also claimed that the victim had been at his home on one occasion when the victim had a cut on two of his fingers. He did not recall what the victim was wearing at that time. (271a) Defendant maintained that his television set had never come up missing and that he did not know Kim Martin and never talked with him. (271a) Defendant was impeached with his 1976 conviction for armed robbery. (268a)

Other witnesses for Defendant confirmed that the victim had been to Defendant's residence on a number of occasions. They also described other people who had been living at the residence. (208a-225a)

Polygraph evidence

Reference to a polygraph taken by witness Ricky Jones was first introduced during trial by defense counsel. During his cross-examination of Detective Mark Clark on the first day of trial, defense counsel asked about statements made by witness Ricky Jones and suggested that he told three different stories. (53a-54a) Defense counsel then asked Detective Clark:

> In fact, you gave Mr. Jones a polygraph on two different occasions, is that correct? (54a)

The prosecutor immediately objected and the judge sustained the objection. (54a-55a)

Detective Clark explained that the statements differed because witness Jones had not wanted to provide names. (55a)

When the jury was excused for the day, the prosecutor requested a mistrial based upon the defense introduction of the fact that witness Jones had been given a polygraph. The trial judge denied the motion. (56a-57a) Although the trial judge indicated he could give a curative instruction, no curative instruction regarding polygraph questions or references was ever provided to the jury. (57a)

Witness Ricky Jones testified on the second day of trial. After questioning him about his statement to the police, the prosecutor asked about the polygraph he had taken and whether he passed it. Only after the witness answered both questions affirmatively did defense counsel object. The judge sustained the objection and told the prosecutor to move on. (87a-88a) No other reference was made to a polygraph during any questions, testimony, arguments or instructions.

The jury was instructed on the sixth day of trial without objection and without a defense request for any curative instruction regarding references to the polygraph. The jury returned a verdict of guilty on each count as charged. (277a-279a)

Post-trial Proceedings

Defendant was sentenced on July 26, 1999. (5a) He subsequently

filed a claim of appeal and submitted a brief to the Court of Appeals raising four issues. The People responded with a brief addressing each issue. (11a)

On July 17, 2001, the Court of Appeals issued an unpublished opinion reversing Defendant's convictions on the basis of one issue. The per curiam opinion by the Court of Appeals concluded that plain error occurred and that Defendant was denied a fair trial when the prosecuting attorney elicited testimony from its "key witness" that he had taken and passed a polygraph test. (13a-15a).

The People sought leave to appeal in this Court and on April 12, 2002, the Court granted the People's application for leave to appeal on one issue:

> Whether the assistant prosecutor erred in asking a key witness whether he had taken and passed a polygraph? (16a)

The Court directed the parties to address the following questions:

- whether the assistant prosecutor erred in asking a key witness whether he had taken and passed a polygraph;
- whether any error was invited by the defense;
- whether and if so, how the invited error doctrine fits into this court's jurisprudence on forfeiture and waiver? (16a)

ARGUMENT

There is no error to review where an issue has been waived by the intentional relinquishment of a known right. By bringing up inadmissible polygraph evidence, the defense waived any claim of error to evidence offered in response. Alternatively, the prosecutor's introduction of polygraph evidence was a justified response to right the scale upset by Defendant's improper question and the defense actions in relation to this issue preclude reversal absent extraordinary circumstances.

STANDARDS OF REVIEW

A decision as to whether the doctrine of waiver may apply to a case is a matter of law subject to de novo review.[1]

The standard of review for forfeited unpreserved error is the plain error standard.[2] A reviewing court's discretion to reverse for plain error should not be exercised unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings. The defendant bears the burden of proving prejudice under the plain error standard. [3]

---

[1] See PEOPLE v SNYDER, 462 Mich 38, 44 n6; 609 NW2d 831 (2000); PEOPLE v SIERB, 456 Mich 519, 522; 581 NW2d 219 (1998).

[2] PEOPLE v CARINES, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); MRE 103(d). See also UNITED STATES v OLANO, 507 US 725, 733-735; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[3] OLANO, supra, 507 US at 734; CARINES, supra, 460 Mich at 763.

APPLICABLE LAW

Waiver

Waiver is the intentional relinquishment or abandonment of a known right.[4] In People v Carter and People v Riley, specifically addressing waiver of testimony that was otherwise inadmissible, this Court explained:

> Deviation from a legal rule is error unless the rule has been waived.[5]

Thus, in People v Carter, this Court recognized that once an issue has been waived, there is no error to review.[6] Waiver may be found in the actions or decisions of a defendant. Waiver may be found in the actions or decisions of defense counsel - because counsel has full authority to manage the conduct of trial and make decisions as to what evidence to introduce and what arguments to pursue.[7]

Recently, in People v Riley, this Court found that where a defendant has knowingly presented testimony through a witness he chose to call, having been warned that the witness might

---

[4] OLANO, supra, 507 US at 733; PEOPLE v CARTER, 462 Mich 206, 215; 612 NW2d 144 (2000).

[5] PEOPLE v RILEY, 465 Mich 442, 448-449; 636 NW2d 514(2001) and CARTER, supra, 462 Mich at 209, 214-215, 219-220 quoting OLANO, supra, 507 US at 732-733.

[6] CARTER, supra, 462 Mich at 209, 215, 219-220. See also FREYTAG v COMMISSIONER, 501 US 868, 894 n2; 111 S Ct 2631, 2647 n2; 115 L Ed 2d 764, 790, n2 (1991)(Scallia, J. concurring); UNITED STATES v ROSS, 77 F3d 1525, (CA7, 1996).

[7] See CARTER, supra, 462 Mich at 218-219.

incriminate him, the defendant waived the issue of admissibility of the evidence presented.[8] Similarly, in People v Washington, this Court found that an unpreserved, constitutional issue that arose due to the defendant's misconduct in failing to appear at a scheduled sentencing is waived by the misconduct and is not subject to appellate review.[9]

The doctrine of invited error appears to be closely related to, if not a part of the doctrine of waiver. Notably, the United States Court of Appeals for the Sixth Circuit has described "the doctrine of 'invited error' as a branch of the doctrine of waiver."[10]

Harboring error as an appellate parachute

In a number of decisions, courts of this state have concluded that to allow a defendant to base error on a situation he caused would allow the defendant to harbor error as an appellate parachute.[11] As Judge, now Justice, Taylor noted in concluding that a new trial should not be granted where defense counsel brought out evidence of a co-defendant's conviction at a separate trial:

---

[8] RILEY, supra, 465 Mich at 448-449.

[9] PEOPLE v WASHINGTON, 461 Mich 294, 298-300; 602 NW2d 824 (1999). See also UNITED STATES v ROSS, supra 77 F3d at 1542 (difference between forfeiture and waiver).

[10] HARRIS v ROADWAY EXPRESS, 923 F2d 59, 61 (CA6, 1991)

[11] RILEY, supra, 465 Mich at 448. See also CARINES, supra, 460 Mich at 762-765; PEOPLE v HARDIN, 421 Mich 296, 322-323; 365 NW2d 101 (1984).

A defendant cannot have it both ways.[12]

The Open Door - Invited Response - Invited Error

In addition to cases prohibiting review based upon an error created as an appellate parachute, cases and commentators recognize a related and well established rule that a prosecutor is entitled to respond to issues raised by the defense.[13] As this Court specifically explained in People v Fields:

> [The] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence...To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.[14]

Numerous courts have recognized that where one party introduces evidence about a particular fact, the other party is entitled to introduce evidence in explanation or rebuttal, even though the latter evidence would be inadmissible had it been offered initially.[15] The right to respond has been characterized by various

---

[12] PEOPLE v BART (ON REMAND), 220 Mich App 1, 15; 558 NW2d 449 (1996).

[13] See e.g. PEOPLE v DUNCAN, 402 Mich 1, 16; 260 NW2d 58 (1977). See also 75A Am Jur 2d Trial sec 584(1991) (Invited error rule).

[14] PEOPLE v FIELDS, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

[15] See PEOPLE v LUKITY, 460 Mich 484, 498; 596 NW2d 607 (1999); STATE v STROMAN, 281 SC 508; 316 SE2d 395, 399 (1984) citing other state and federal cases. See also STATE v MELLO, 137 NH 597, 601; 631 A2d 146, 148 (1993)(where a defense witness lies on the stand and creates a misleading advantage, the prosecutor is entitled to counter with evidence to refute the impressions created by his testimony).

cases and commentators as "opening the door", "fair response", or "invited error" and has been applied to a wide range of conduct.[16]

In United States v Robinson, the United States Supreme Court found that the prosecutor was entitled to make a fair response to claims made by the defense even when a constitutional right and bright line rule was in issue. The prosecutor's comments came as a direct response to defense counsel's attempt to convert the protection of the 5th amendment into a "sword" by arguing that the government prevented defendant from testifying.[17]

In United States v Young, the Supreme Court discussed the "invited reply" rule, and explained that the record as a whole must be reviewed before reversal may be based upon a prosecutor's remarks.[18] The Court stated:

---

[16] UNITED STATES v ROBINSON, 485 US 25, 28-32; 108 S Ct 864; 99 L Ed 2d 23 (1988)(fair response - argument); LUKITY, supra, 460 Mich at 498 (opening the door - cross examination); VANNOY v CITY OF WARREN, 386 Mich 686, 690; 194 NW2d 304(1972)(invited error - instructions); PEOPLE v AMISON, 70 Mich App 70, 75; 245 NW2d 405 (1976)(invited error - response to defense questioning). See also HARRIS, supra, 923 F2d at 60-61(explaining doctrine of invited error and noting application to a wide range of conduct).

[17] ROBINSON, supra, 485 US at 32.

[18] UNITES STATES v YOUNG, 470 US 1, 11-13; 105 S Ct 1038; 84 L Ed2d 1 (1985).

> [I]f the prosecutor's remarks were invited, and did no more than respond substantially in order to right the scale, such comments would not warrant reversing a conviction.[19]

Several courts have more graphically explained that a defendant may not complain on appeal about a damaging but direct response to evidence the defendant introduced:

> The response evoked may have been highly damaging, but one who would pry open a box may expect to have the lid slammed on his fingers.[20]

The court in Kubitsky making the above statement also noted that it could not possibly be open to a defendant to suggest certain facts and then foreclose a full response.[21]

Courts discussing invited error or reply rule have generally explained that introduction of improper evidence precludes later objection to any response.[22] Invited error is not, however, always

---

[19] Id. at 12. See also COLEMAN v O'LEARY, 845 F2d 696, 701 (CA7, 1988) (the doctrine of invited error has been applied whenever a defendant acquiesces or participates in the introduction of error in the record).

[20] UNITED STATES v KUBITSKY, 469 F2d 1253, 1255 (CA1, 1972); STATE v MCDONOUGH, 350 A2d 556, 563 (Me 1976).

[21] KUBITSKY, supra, 469 F2d 1254-1255.

[22] See PEOPLE v COLLINS, 63 Mich App 376, 381; 234 NW2d 531 (1975) (a party obtaining a responsive answer to a question he has asked has "waived objection" - such a response falls within the "invited error" rule); UNITED STATES v DAVIS, 443 F2d 560, 564-565 (CA5, 1971) cert den 404 US 945 (1971) (where invited error exists, it precludes a court from invoking the plain error rule and reversing). See also VANNOY, supra, 386 Mich at 690 (party may not ask for appellate review of an error in giving an instruction he requested); PEOPLE v PEARSON, 123 Mich App 462, 465; 332 NW2d 574 (1983) (prosecutor's specific question on subject generally referred to by the defense not improper).

applied as a rule strictly precluding appellate review, some cases suggest a limited consideration for review, i.e. whether a response is justified and fair.[23] Justice Cavanagh in People v Finley suggested the possibility of such a limited opening for review, while suggesting invited error may never be the basis for reversal:

> [I]nvited error…is seldom, if ever grounds for reversal in either civil or criminal litigation".[24]

Thus, like the Court in Young, courts applying the invited reply or invited error doctrine tend to look at the context to determine whether the defendant caused the error complained about and whether the reply is in fact fairly responsive.

Forfeiture - Unpreserved error

Forfeiture has been explained as the failure to make the timely assertion of a right - an issue that has not been properly preserved in the trial court has been forfeited and cannot be raised on appeal absent compelling or extraordinary circumstances.[25] Thus, forfeited error remains subject to appellate review in limited circumstances.[26]

---

[23] See FRYMAN v FEDERAL CROP INSURANCE CORP, 936 F2d 244, 250 (CA6, 1991).

[24] PEOPLE v FINLEY, 431 Mich 506, 543 n11; 431 NW2d 19 (1988).

[25] CARINES, supra, 460 Mich at 774; PEOPLE v GRANT, 445 Mich 535, 546; 520 NW2d 123 (1994).

[26] RILEY, supra, 465 Mich at 449, citing CARINES, supra, 460 Mich at 774.

To properly preserve an error for review, objections to questions or procedures must be made in a timely and specific fashion.[27] The Supreme Court in United States v Young, noted that the plain error exception to the contemporaneous objection rule is to be "used sparingly" and explained further:

> Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection - a practice which we have criticized as 'extravagant protection.'[28]

The Court of Appeals in addressing an evidentiary issue - specifically a reference to a polygraph - described the error review standard as follows:

> [T]he failure to request a mistrial is tantamount to counsel's failing to preserve an objection. Under such a circumstance, a defendant is entitled to the limited review afforded under the forfeited nonconstitutional error standard … plain error that affected his substantial rights.[29]

As this Court has explained, to avoid forfeiture under the plain error rule, three requirements must be met:

(1) error must have occurred;

(2) the error was plain, i.e., clear or obvious; and

(3) the plain error affected substantial rights.[30]

---

[27] MRE 103(a)(1); PEOPLE v CAIN, 238 Mich App 95, 115; 605 NW2d 28 (1999) lv den 463 Mich 853 (2000); IN RE WEISS, 224 Mich App 37, 39; 568 NW2d 336 (1997).

[28] YOUNG, supra, 470 US at 16 (footnote omitted).

[29] PEOPLE v NASH, 244 Mich App 93, 96-97; 625 NW2d 87 (2000).

The third requirement means that defendant must make a showing of prejudice - that the error affected the outcome of lower court proceedings. The defendant bears the burden of showing prejudice.[31]

As this Court has explained:

> Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence.[32]

Evidence of a polygraph

In Michigan, as in most states, references to a polygraph are normally inadmissible in a criminal prosecution.[33] Our Court of Appeals has even characterized this policy as a bright line rule.[34] However, a reference to a polygraph test does not always constitute reversible error.[35] A number of factors come into play in assessing what if any harm has been caused by evidence about a polygraph coming in at trial. Courts often consider whether the lie detector

---

[30] CARINES, supra, 460 Mich at 763, 774.

[31] Id; OLANO, supra, 507 US at 734.

[32] PEOPLE v ALLEN, 466 Mich 86, 89-90; ___ NW2d___ (2002) quoting CARINES, supra, 460 Mich at 763.

[33] PEOPLE v BARBARA, 400 Mich 352, 357, 364; 255 NW2d 171 (1977); NASH, supra, 244 Mich App at 100-101; PEOPLE v PUREIFOY, 128 Mich App 531, 535; 340 NW2d 320 (1983) lv den 418 Mich 962 (1984).

[34] NASH, supra, 244 Mich App at 97.

[35] See NASH, supra, 244 Mich App at 98, and cases cited therein.

reference involved the defendant or a witness, with such evidence offered in relation to a defendant considered more damaging.[36] Our courts have also recognized that defense counsel may bring out such a reference as a matter of trial strategy.[37] However, such a defense tactic must be made at one's own peril. In a case specifically involving a prosecutor's introduction of evidence regarding an otherwise inadmissible polygraph examination, the Supreme Court of North Carolina found such evidence admissible where the defendant "opened the door."[38] The North Carolina Supreme Court explained as follows:

> [D]efendant on direct examination had testified that he told officers he would be willing to take a lie detector test. This testimony, unexplained, could well lead the jury to believe that the State had refused to give defendant such a test with favorable results which the state had suppressed. Under such circumstances, the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.[39]

---

[36] See PANTAZES v STATE, 141 Md App 422; 785 A2d 865, 882 (2001) cert den 792 A2d 1178 (2002); CAPANO v STATE, 781 A2d 556, 600-601 (Supreme Court Del 2001). See also 88 ALR3d 227 (1978)(Evidence of accused taking polygraph); 15 ALR 4th 824 (1982)(evidence of witness taking polygraph).

[37] NASH, supra, 244 Mich App at 98.

[38] STATE v ALBERT, 303 NC 173; 277 SE 2d 439, 441 (1981).

[39] Id.

DISCUSSION

Waiver

As recent decisions of this Court have clarified - a waiver involves the intentional relinquishment or abandonment of a known right so that later review is precluded. Any claim of error is extinguished - leaving no error to review.

A review of the various cases noted above suggests that recent decisions clarifying the rule of waiver and distinguishing forfeiture, support application of the waiver rule to all issues knowingly introduced or raised by the defense during trial. The application of waiver to issues (questions, arguments, or instructions) raised by the defense is consistent with recent decisions of this Court such as Riley, Carter and Washington addressing waiver. Thus, in the present case where the defense raised the inadmissible topic of a polygraph as some sort of tactical maneuver to discredit a witness and suggest doubt, he waived review of the issue - including any specific response by the People.

Including invited response or invited error within the doctrine of waiver is also logically consistent with decisions of the United States Supreme Court in Young and Robinson, with decisions of the courts of this state such as Fields and Vannoy, and with decision in other jurisdictions that generally view an invited response or invited error as opening the door or prying open a box - thereby precluding review. Federal decisions, in

particular, view invited error as precluding review - even to the point where the Sixth Circuit Court of Appeals has described invited error as a branch of the doctrine of waiver.

Past decisions seem to suggest some limited right to review is available in an invited error situation, but those decisions must be reconciled with recent decisions clarifying the doctrine of waiver. In doing so, it becomes clear that to the extent past decisions leave open some limited right to review, they do not explain the basis for such a possibility. In cases such as YOUNG, the Court suggests that review is to determine if the claimed error was "invited". The People suggest that upon making such a finding, the waiver rule should be applied to the issue so that affirmative acts by a party, that introduce a deviation from a legal rule into a trial, preclude any later review. Allowing some limited review is inconsistent and unwarranted.

In the present case, application of the waiver rule would result in a finding that the Defendant waived any right to review on references to the polygraph of witness Jones because the defense opened the door by affirmatively raising the issue of a polygraph given to a witness. Thus, the defense waived any right to claim error based upon deviation from the legal rule precluding introduction of polygraph evidence. As a result, there was no error to review. Therefore, the Court of Appeals decision finding error based upon the prosecutor's questions about the witness' polygraph must be reversed.

A limited right to review

As an alternative to applying the waiver rule which entirely extinguishes the right to review, the doctrine of fair response or invited error should be viewed as precluding review absent extraordinary circumstances. Such a limited right to review has been suggested or recognized in a number of cases. Where the defense has raised an issue to which the prosecutor responds and then defense then fails to make a timely objection to the response, a forfeiture analysis requiring plain error review should apply.

In the present case, the Court of Appeals found that the plain error standard applied to the issue of polygraph evidence. However, the Court of Appeals erroneously relied upon and compared their decision in People v Nash, and failed to consider Defendant's burden to show prejudice. (13a-15a) The instant case is distinguishable from Nash not only in the manner that evidence regarding the polygraph was introduced, but also on the basis of Defendant's failure to establish prejudice in light of other substantial evidence supporting the guilty verdict.

The defense clearly failed to preserve the error for review in this case because:

- defense objection to the prosecutor's questions was not timely,
- the defense made no request to the court to strike the questions and responses,
- the defense made no request for a mistrial.
- the defense made no request for any kind of a curative or limiting instruction,

In addition to the Ricky Jones eyewitness testimony about Defendant's vicious assault upon the victim, there was evidence in the instant case indicating that:

- Julie Pryor heard Defendant make statements that he intended to get the victim "Rodel" because he believed he stole his TV (162a-163a, 172a-173a);

- Defendant made several admissions to Julie Pryor about his involvement in kicking the victim, including remarks, such as, "I kicked his ass", "stomped his ass", "he ain't going to steal my TV no more, I bet you he ain't going to do nothing." (168a-178a);

- DNA analysis indicated the victim's blood was on the lower pantleg of a pair of Defendant's pants (132a-141a);

- DNA analysis indicated the victim's blood was on a pair of Co-Defendant's shoes (124a-126a); and

- Defendant and co-conspirator Martin both had a motive and intent to get back at the victim (162a-163a, 172a-174a, 110a, 114a-116a, 142a-152a).

Moreover, there was evidence that the information provided by the eyewitness was accurate - consistent with his description of the assault, including:

- the DNA evidence - location and type, noted above (124a-126a, 132a-141a);

- the blood splatter, seeping evidence described by the serologist (132a, 137a-141a);

- police descriptions of the scene indicating that the victim was found shirtless, and a shirt and coat were found near the street in a position consistent with the victim's initial twisting escape from Martin's assault as described by eyewitness Jones (21a-25a, 45a-47a, 236a-237a).

Therefore, even if the references to witness Ricky Jones' polygraph test was error, it did not rise to the level of plain error requiring correction to prevent a miscarriage of justice or to

preserve the integrity of the proceedings. The facts and evidence viewed as a whole do not create the kind of extraordinary circumstances that require reversal. There is no evidence that Defendant was actually innocent and the error cannot be considered to have prejudiced Defendant or seriously affected the fairness of the trial given the all of the other evidence establishing Defendant's guilt, including his own admissions. Thus, even with a limited right to review, Defendant was not entitled to a new trial and the Court of Appeals decision must be reversed.

SUMMARY AND RELIEF

Evidence that is otherwise inadmissible may be admitted where an opposing party first opens the door to the issue. By affirmatively raising the issue of a polygraph given to a witness in this case, the defense waived any right to claim error where he initiated the deviation from the legal rule precluding reference to any polygraph information. Utilizing this method to suggest deception and raise doubt, the defense made a tactical decision to introduce an inadmissible topic for his own advantage. Such a knowing and direct act must be deemed a waiver, leaving no error to review.

Even if this court determines that Defendant's introduction of information about a polygraph given to witness Jones did not constitute a waiver of the issue or topic, review of the issue must be limited. The error clearly was not preserved where the defense initiated the reference to the polygraph given to witness Jones, the defense failed to make a timely objection when the prosecutor asked witness Jones about the polygraph, the defense failed to request the answers be stricken, and the defense failed to request a mistrial or curative instruction. Failure to preserve the issue constitutes a forfeiture, limiting review to plain error. Defendant has not shown plain error warranting reversal because assuming Defendant satisfied the first two requirments under the plain error rule, Defendant did not sustain his burden of showing prejudice as

degree Murder and Conspiracy to commit First-degree Murder were the result of substantial evidence presented during the course of a fair trial.

Therefore, the People respectfully request that this Honorable Court reverse the Court of Appeals' decision and reinstate Defendant's convictions and sentence.

Respectfully submitted,

MICHAEL D. THOMAS (P23539)
PROSECUTING ATTORNEY

Dated: June 7, 2002.

JANET M. BOES (P37714)
ASSISTANT PROSECUTING ATTORNEY
Saginaw County Courthouse
111 S. Michigan Avenue
Saginaw, MI 48602
(989) 790-5330

S T A T E O F M I C H I G A N

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R. A. Griffin, J. T. Neff, H. N. White

PEOPLE OF THE STATE OF MICHIGAN, **Plaintiff-Appellant**	**Supreme Court** **No. 119818**
-vs-	**Court of Appeals** **No. 221264**
JONATHAN JOE JONES, **Defendant-Appellee**	**Saginaw Circuit Court** **No. 98-016374-FC-3**

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF SAGINAW)

JANET M. BOES, being sworn, states that on June 7, 2002, she personally delivered, the original plus twenty-four (24) copies of Appellant's Brief on Appeal - Oral Argument Requested and Appendices, together with Proof of Service, to **Clerk, Michigan Supreme Court.**

Dated: June 7, 2002

JANET M. BOES

Subscribed and sworn to before me
On June 7, 2002.

MARIA A. SIAN, Notary Public
Saginaw County, Michigan
My Commission Expires: December 3, 2003

S T A T E O F M I C H I G A N

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: R. A. Griffin, J. T. Neff, H. N. White

PEOPLE OF THE STATE OF MICHIGAN, **Plaintiff-Appellant**	**Supreme Court** **No. 119818**
-vs-	**Court of Appeals** **No. 221264**
JONATHAN JOE JONES, **Defendant-Appellee**	**Saginaw Circuit Court** **No. 98-016374-FC-3**

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF SAGINAW)

MARIA A. SIAN, being sworn, states that on June 7, 2002, she mailed two copies of Appellant's Brief on Appeal - Oral Argument Requested and its Appendices, together with Proof of Service to counsel for Defendant-Appellee, **Lester O. Pollak, Attorney at Law,** 306 First Street, Jackson, MI 49201, and one single copy to **Clerk, Attorney General,** 116 W. Ottawa Street, Suite 600, Lansing, MI 48913, **Clerk, Michigan Court Appeals,** 109 W. Michigan Ave., Lansing, MI 48909, by placing the documents in the United States mail, properly addressed, with first-class postage fully paid.

Also that a single copy was personally delivered to Clerk, Saginaw Circuit Court, 111 S. Michigan Ave., Saginaw, MI 48602

Dated: June 7, 2002

Maria A. Sian
MARIA A. SIAN

Subscribed and sworn to before me
On June 7, 2002.
Beth A. Bauer
BETH A. BAUER, Notary Public
Saginaw County, Michigan
My Commission Expires: April 10, 2003